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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

ANTOINETTE M. FARACO, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Antoinette M. Faraco, by her counsel, prays that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 2) is reported at 29 T.C. No. 76. The opinion of the Court of Appeals is not yet reported, but is printed in the Appendix, *infra*, pp. 1a-4a.

JURISDICTION

The judgment of the Court of Appeals (Appendix, *infra*, p. 5a) was entered on November 3, 1958. Jurisdiction was conferred on the Court of Appeals by Section 7482(a) of the Internal Revenue Code of 1954, 26 U.S.C.,

Section 7482(a). Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Does the imposition upon a widow of a 40.37% additional income tax penalty solely because she lost her marital status by the death of her husband, constitute the taking of her property without due process of law, the denial of equal protection of law, the arbitrary confiscation of property, an unreasonable, capricious, and discriminatory classification for taxation, and the imposition of direct tax, in violation of any provision contained in Article 1, Section 2, Clause 3, Article 1, Section 9, Clause 4, the Fifth Amendment, the Fourteenth Amendment, or the Sixteenth Amendment of the Constitution of the United States?

2. Is the 1954 basis for depreciation of petitioner's bus terminal real estate (which she received as tenant by the entirety and/or as an inheritance under her husband's will upon his death on December 26, 1953) the valuation at which respondent required such real estate to be included for Federal estate tax purposes, rather than the unrecovered portion of the 1947 cost thereof, because

(a) such 1954 depreciation basis is controlled by Section 1014(a) of the Internal Revenue Code of 1954, making it clear that the date of death valuation applies, and

(b) Section 113(a)(5) of the Internal Revenue Code of 1939 under which the basis for depreciation was determined prior to 1954 was unqualifiedly repealed by the 1954 Code, leaving no basis for depreciation whatsoever unless Section 1014(a) of the 1954 Code controls?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

See Appendix, *infra*, pages 6a-12a.

STATEMENT

The facts were stipulated and are as follows:

Petitioner was married in 1933 and her husband died a resident of Virginia on December 26, 1953 (R. App. B 14). Petitioner was a widow during 1954 (R. App. B 14).

As stipulated, petitioner's 1954 income tax liability was increased by 40.37% (from $7,275.04 to $10,211.83) because she lost her marital status due to the death of her husband on December 26, 1953 (R. App. B 14).

On November 4, 1947, petitioner's husband purchased the bus terminal property located at 707 North Randolph Street, Arlington, Virginia, at a cost of $159,029.33 (R. App. B 14-15). Under the deed the property was held by petitioner and her husband until his death as tenants by the entirety with common law right of survivorship (R. App. B 14-15). The will of petitioner's husband, duly probated in Fairfax County, Virginia, gave, devised, and bequeathed all of his estate, both real and personal, to petitioner (R. 3).

Respondent determined that the bus terminal real estate was includible in the estate of petitioner's deceased husband at its full value at the date of death of $650,000 for Federal estate tax purposes and petitioner agreed that such determination was correct (R. 4). Respondent also determined that petitioner is entitled to depreciation only on the unrecovered portion of the basis of the 1947 cost of $159,029.33 rather than on the Federal estate tax valuation of $650,000 and the Court of Appeals has sustained respondent's position (App., *infra*, pp. 1a-4a). The Court of Appeals stated that the conclusion to which it was "forced" was "inherently inequitable" (App., *infra*, p. 2a). For the year involved, 1954, petitioner's income

tax liability would have been $5,477.87 less if she had been allowed depreciation as provided in Section 1014(a) of the 1954 Code on the basis of the Federal estate tax valuation.

The Tax Court completely avoided the constitutional issue as to the validity of a 40.37% additional income tax penalty on widowhood (R. 3-7). The Court of Appeals dealt with the constitutional issue and held that the 40.37% penalty imposed upon petitioner because she was a widow is "not unreasonable" as a classification for the imposition of income tax. The Court of Appeals concluded that because the 40.37% penalty on widowhood is "slight" such penalty "ran afoul of no constitutional guaranty" (App., *infra*, p. 4a).

On the depreciation issue, the Court of Appeals recognized "the unqualified repeal of § 113(a)(5) of the 1939 Code", under which respondent contended that the 1954 depreciation basis of the bus terminal was fixed. The Court further recognized that respondent's position was "inherently inequitable" but the Court felt "forced" to decide against petitioner because of its belief that only "Congress may remove" the obvious injustice to petitioner "however appealing" are "the equities of the taxpayer's situation here" (App., *infra*, pp. 2a-4a).

As will be shown below, petitioner respectfully maintains that the Court of Appeals has erroneously decided extremely important questions of Federal law on both the constitutional and depreciation issues.

REASONS FOR GRANTING THE WRIT

I. There Is Nothing "Slight" About the Imposition Upon a Widow of a 40.37% Additional Income Tax Penalty Solely Because She Lost Her Marital Status by the Death of Her Husband. Therefore, the Court of Appeals Erred on an Important Question of Federal Law in Holding That Such Unprecedented and Discriminatory Taking of Petitioner's Property "Ran Afoul of No Constitutional Guaranty" Because the Discrimination Is Allegedly "Slight".

1. The Court of Appeals apparently recognized, as it should, "that a Federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment." *Tyler* v. *United States*, 281 U.S. 497, 74 L. Ed. 999, 8 AFTR 10912 (1930); *Cohan* v. *Commissioner*, 39 F. 2d. 540, 545, 8 AFTR 10552 (CA 2, 1930); *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 66 L. Ed. 817 (1922); *A. Magnano* v. *Hamilton*, 292 U.S. 40, 78 L. Ed. 1109 (1934); *Heiner* v. *Donnan*, 285 U.S. 312, 76 L. Ed. 772, 10 AFTR 1609 (1932); *Nichols* v. *Coolidge*, 274 U.S. 531, 71 L. Ed. 1184, 6 AFTR 6758 (1927); *Helvering* v. *City Bank Farmers Trust Co.*, 296 U.S. 85, 80 L. Ed. 62, 16 AFTR 981 (1935), rehearing denied 296 U.S. 664, 80 L. Ed. 473, 16 AFTR 1283 (1935); *Eisner* v. *Macomber*, 252 U.S. 189, 64 L. Ed. 521, 3 AFTR 3020 (1920); and Mertens, *Law of Federal Income Taxation* (1956 Edition), Sections 4.01 and 4.09. It would seem also that the Court of Appeals was aware of the fact that petitioner is entitled to protection against gross discrimination under the equal protection clause of the Fourteenth Amendment. *Bowling* v. *Sharpe*, 347 U.S. 497, 98 L. Ed. 884 (1954); *Hurd* v. *Hodge*, 334 U.S. 24, 92 L. Ed. 1187, 1195 (1948); *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 208, 209, 89 L. Ed. 173 (1944); *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112, 93 L. Ed. 533 (1949); and *Hillsborough Township* v. *Cromwell*, 326 U.S. 620, 90 L. Ed. 358 (1946).

2. Thus the Court of Appeals' error is predicated upon its failure to recognize the *magnitude* of the unreasonable

and grossly discriminatory penalty imposed upon petitioner *solely because she was a widow.*

3. The penalty, of which petitioner complains, resulting from depriving her of the split income device due to the death of her husband, goes up to more than 45% each year and up to over $25,000.00 annually (R. 13 Ex. A 24-28). The split income device makes the marital status, *regardless of dependents or capacity to pay,* have an annual value of investment income on more than $11,000,000.00 (R. 13 Ex. A 22-24). The imposition of such ruinously heavy penalty on widowhood cannot properly be held to run "afoul of no constitutional guaranty" because it is allegedly "slight".

4. The President of the United States vetoed the split income device on the ground that it benefited less than 5% of taxpayers to the detriment of all other taxpayers (R. 13 Ex. A 11-12).

5. The late Randolph E. Paul explained to the Congress the seriousness of the gross discrimination brought about by the marital split income device whereby billions of dollars of taxes are shifted annually from the wealthiest taxpayers to those with the least capacity to pay (R. 13 Ex. A 9-11).

6. Senators Douglas and O'Mahoney and Congressmen Combs, McCormack, Sabath and Eberharter explained in detail what would be the disastrous consequences to the economy of the United States by reversing "the historic principle of taxation based upon ability to pay" and embarking upon grossly discriminatory taxation upon those having the least capacity to pay (R. 13 Ex. A 12-29). In addition to confiscating earnings of 95% of the taxpayers having the *least capacity to pay* for the benefit of 5% having the *greatest capacity to pay,* as the President's veto message explained would be the case, the split income device has already resulted in increasing the National Debt by approximately $40 billion dollars and greatly increased the carrying charge of that Debt (R. 13 Ex. A 29-30).

7. It is now well understood that if the value of the dollar continues to decline for the next 30 years at the rate of decline during the past 30 years the dollar will have a zero value in 1988. What is seemingly not understood, however, is that the decline will greatly accelerate as the carrying charge on the National Debt pyramids due to the failure to meet current expenses from taxation (R. 13 Ex. A 30).

8. Respondent defended the split income device below on the ground that its enactment was necessary in order to prevent *mass migration* of wealthy married people from common law states to community property states *to escape grossly discriminatory taxation* (R. 7 App. A). The Court of Appeals erred in deciding against petitioner on this spurious ground (App., *infra*, p. 4a). The fact is that the split income device was an even greater boon to many married taxpayers in the community property states than in the common law states, because it provided for the splitting of pre-marital estate income and the preventing of one-half of earned income from being added to pre-marital estate income and being taxed in the higher brackets (R. 13 Ex. A 12-13). But, accepting respondent's contention at face value, *the United States affords no sanctuary to which the widowed petitioner may migrate to escape the grossly discriminatory penalty taxation admittedly imposed upon her.* Consequently, petitioner, who has no other place to go, comes to this Court for protection and relief under the Constitution to which she is justly entitled.

9. The holding below that petitioner is entitled to the protection of "no constitutional guaranty" because the huge 40.37% penalty imposed upon her is "slight" is just as erroneous as it would have been for this Court to have held in *Bowling* v. *Sharpe*, *supra*, that discrimination in the public schools of the District of Columbia was so "slight" as to be beyond the reach of the Constitution because Negro and White schools were located only a few blocks apart.

10. Petitioner respectfully submits that the constitutional issue here involved presents one of the most serious questions of Federal law that has ever been presented to any court in the United States. See Entire Record.

II. The Court of Appeals Held That the Basis for Depreciation Provided in Section 113(a)(5) of the 1939 Code Was Unqualifiedly Repealed by the 1954 Code. The Court Further Held That Section 1014(a) of the 1954 Code Provided a "Reasonable Rule" Granting Depreciation on the Basis of Federal Estate Tax Valuation. The Court Erred in Holding That Section 1014(b)(9) of the 1954 Code Limited 1014(a) as to Petitioner's Property and Deprived Her of Any Basis for Depreciation Whatsoever.

11. Respondent contended below that the 1954 depreciation basis of petitioner's bus terminal real estate was controlled by Section 113(a)(5) of the 1939 Code and fixed at its original 1947 cost regardless of the $650,000-valuation for Federal estate tax purposes. The Court of Appeals correctly held that Section 113(a)(5) of the 1939 Code was unqualifiedly repealed by the 1954 Code (App., *infra*, p. 2a). See 1954 Code Sections 1052(c) and 7851(a)(1)(C) which make it clear that Congress deliberately repealed Section 113(a)(5) of the 1939 Code and deliberately refrained from carrying over to 1954 and subsequent years the basis provision contained in Section 113(a)(5) of the 1939 Code.

12. It is clear, as held by the Court of Appeals below, that Section 113(a)(5) of the 1939 Code was unqualifiedly repealed and superseded for all purposes by Section 1014 of the 1954 Code (R. 21-26).

13. Section 1014(a) of the 1954 Code eliminated the restrictive words "by bequest, devise or inheritance" upon which this Court's opinion in *Lang* v. *Commissioner of Internal Revenue*, 289 U.S. 109, 77 L. Ed. 1066, 12 AFTR 45 (1933), was based. Thus it is entirely clear that the Congressional purpose was to provide *a uniform basis for depreciation for all taxpayers in 1954 and subsequent years* regardless of whether property was acquired by

survivorship or bequest, devise, or inheritance. The Court of Appeals seemingly recognized this purpose by its reference to the "reasonable rule" of Section 1014 and "the liberalized rule" provided therein (App., *infra*, p. 3a). The Treasury Regulations (T.D. 6265, filed November 6, 1957, Section 1.1014-4) state the general purpose of Section 1014(a) as follows:

> "*Uniformity of basis; adjustment to basis*—(a) *In general.* (1) The basis of property acquired from a decedent, as determined under Section 1014(a), *is uniform in the hands of every person having possession or enjoyment of the property at any time* under the will or other instrument or under the laws of descent and distribution. The principle of uniform basis means that the basis of the property (to which proper adjustments must, of course, be made) will be the same, or uniform, whether the property is possessed or enjoyed by the executor or administrator, the heir, the legatee, or devisee, or the trustee or beneficiary of a trust created by a will or an inter vivos trust. In determining the amount allowed or allowable to a taxpayer in computing taxable income as deductions for depreciation or depletion under section 1016(a)(2), the uniform basis of the property shall at all times be used and adjusted." (Emphasis supplied)

14. The Court of Appeals concluded, however, that it was "forced" to hold that Congress intended to restrict "the liberalized rule" of 1954 Code Section 1014(a) because of the provisions of Section 1014(b)(9). The result of its holding that 1939 Code Section 113(a)(5) was unqualifiedly repealed and that 1954 Code Section 1014(a) does not apply is that petitioner is *left with a zero basis* for determining either depreciation or gain or loss upon disposition of the bus terminal property which her husband purchased at a cost of $159,029.33 and on which his estate was required to pay Federal estate tax at a $650,000 valuation. This, of course, is tantamount to confiscation of her property.

15. Petitioner respectfully maintains that the Court of Appeals has erroneously decided a most important question of Federal law depriving petitioner, and all others similarly situated, of any basis for depreciation when Congress clearly intended no such result and avoided enacting any language requiring such an inequitable decision. The Court of Appeals is in accord with petitioner's view that had Congress stopped with Section 1014(a), she would be entitled to the Federal estate tax valuation for depreciation purposes. Section 1014(a) fixes the basis for depreciation, from 1954 on, for all purposes "except as otherwise provided", but simply makes it doubly clear that with respect to all decedents dying after December 31, 1953, just as in the case of all other decedents dying before that date, the Federal estate tax valuation shall control for 1954 and subsequent years.

16. Undoubtedly, as stated in T.D. 6265 quoted above, the purpose of 1954 Code Section 1014(a) was to provide a basis "*uniform in the hands of every person having possession or enjoyment of the property at any time*" from 1954 on. Had Congress intended otherwise it would not have unqualifiedly repealed 1939 Code Section 113(a)(5) and deliberately refrained from preserving and carrying over the basis provided in Section 113(a)(5). This is obvious when it is realized that in every Revenue Act Congress has preserved and carried over the March 1, 1913 basis and every other basis for property which it intended to apply for subsequent years (R. 21-26).

17. Even had the 1954 Code been the product of skillful draftsmen there would clearly be no reason to think that the uniform basis of Section 1014(a) was destroyed by Section 1014(b)(9) leaving petitioner, and all others similarly situated, without any basis whatsover. But, when it is realized that the 1954 Code was the product of such inept drafting that the Treasury Department has not been able to this day to complete its Regulations thereunder, there can certainly be no reason for the strained

reasoning, not advanced by either party, which the Court of Appeals has adopted *sua sponte* in holding that the 1954 Code *deprived petitioner of any and all basis for depreciation.*

18. The Court of Appeals takes the position that "only Congress may remove" the inequity. Petitioner maintains that a reasonable construction of Section 1014 leaves no doubt that she is entitled to the uniform basis for depreciation provided for all other taxpayers under Section 1014 of the 1954 Code.

19. It is respectfully submitted that the Court of Appeals' holding that petitioner has no basis for depreciation of her bus terminal property is based upon a clearly erroneous principe of important Federal law and should be dealt with by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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